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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

WILLIE ELLIS LANIER,

Petitioner,

versus

1551

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

No.

WILLIE ELLIS LANIER,

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versus

UNITED STATES OF AMERICA,

Respondent..

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States of America:

Petitioner, Willie Ellis Lanier, by his attorney, S. Gunter Toney, presents this his Petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks to have reviewed a judgment of the United States Court of Appeals, Fourth Circuit, dated the 4th. day of March, 1970, affirming the judgment and sentence of the United States District Court for the Eastern District of North Carolina, Raleigh Division, on appeal; the Petition for Rehearing was denied on the 30th. day of March, 1970, and is included in the certified transcript of the record filed herewith.

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals,Fourth Circuit, is 62 Statutes 928 (June 25, 1948, Chapter 646).

QUESTIONS PRESENTED FOR REVIEW

The points relied on by the Petitioner for granting of the Writ of Certiorari, is as follows:

DID THE DISTRICT COURT ERR IN FINDING THAT THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN WHERE EVIDENCE WAS IN SHARP CONFLICT BETWEEN PETITIONER AND GOVERNMENT AGENT AS TO THE PETITIONER'S DEMAND FOR COUNSEL AND WHERE THE PETITIONER'S VERSION IS CORROBORATED BY SUCH AGENT ADMITTING:
(1) THAT PETITIONER REFUSED TO SIGN WRITTEN WAIVER OF COUNSEL,
(2) REQUESTED TO CONTACT HIS WIFE TO SECURE COUNSEL, AND,
(3) HE (AGENT) CONTACTED PETITIONER'S WIFE AND LEARNED OF HER INABILITY TO OBTAIN COUNSEL?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES AND RULES INVOLVED

Title 18 U.S.C., Sec. 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806."

STATEMENT OF THE CASE

The Petitioner was indicted by the Grand Jury of the United States District Court for the Eastern District of North Carolina, Raleigh Division.

Count One of the Indictment charged Petitioner with violation of 18 U.S.C. 2312 (interstate transportation of a stolen motor vehicle).

Out of the presence of the jury the District Court took testimony as to the admissibility of the admissions and confession of Petitioner (TR. 56-62). The District Court made a finding that the evidence established beyond a reasonable doubt that such admissions or confession was voluntarily given (TR. 62-63).

Petitioner was tried by jury and found guilty (TR. 165) and sentenced for a period of five (5) years (R. 10).

ARGUMENT

DID THE DISTRICT COURT ERR IN FINDING THAT THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN WHERE EVIDENCE WAS IN SHARP CONFLICT BETWEEN PETITIONER AND GOVERNMENT AGENT AS TO THE PETITIONER'S DEMAND FOR COUNSEL AND WHERE THE PETITIONER'S VERSION IS CORROBORATED BY SUCH AGENT ADMITTING:
(1) THAT PETITIONER REFUSED TO SIGN WRITTEN WAIVER OF COUNSEL,
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(3) HE (AGENT) CONTACTED PETITIONER'S WIFE AND LEARNED OF HER INABILITY TO OBTAIN COUNSEL?

This Court in Miranda v. State of Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 1612 held:

> "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." ...
>
> "An individual need not make a pre-interrogation request for a lawyer ... . No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings ... ." (384 U.S. at Page 370, 86 S. Ct. at Page 1626).
>
> " If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (384 U.S. at Page 475, 86 S. Ct. at Page 1628).
>
> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." (384 U.S. at Page 476, 86 S. Ct. at Page 1629).

Officer Donald M. Murray, Special Agent of the Federal Bureau of Investigation testified that on March 5, 1969, he conducted an in-custody interrogation of Appellant (Tr. 38, 45); and Appellant was advised of his constitutional rights:

> "... he did not have to discuss the matter with me, or even talk to me, and whatever he told me could be used against him in a court of law, that he was entitled to an attorney and if he could not have an attorney or afford an attorney one would be appointed for him, at any time he desired to stop discussing it if he so chose to discuss, he could stop, he had the right to remain silent.
>
> Q: Did he desire to make any statement after being advised?
>
> A: Yes, sir, he did. I asked him if he would sign a waiver, and he said he did not want to sign the waiver and he said he did not want to sign the waiver because he was willing to orally waive these rights and discuss the matter with me." (Tr. 45-46).

Agent Murray then, out of the presence of the jury stated that Appellant answered the questions up to a point where he indicated a desire to contact counsel "...concerning an anticipated hearing ... ."; that at this point the interview was concluded (Tr. 49).

Out of the presence of the jury the Appellant testified that he refused to sign a waiver presented to him by Agent Murray (Tr. 57); that he was advised of his right to remain silent and to consult with an attorney; that he (Appellant) specifically requested the opportunity to consult with an attorney; that the Agent persisted in questioning him (TR. 58); that he (Appellant)

sought permission to talk with his wife for the purpose of obtaining an attorney (Tr. 60); that he finally gave his consent for the search of his vehicle (Tr. 62).

The District Court ruled that the evidence established beyond a reasonable doubt that the Appellant's admissions were voluntarily given (Tr. 62-63).

In the presence of the jury, Agent Murray repeated his testimony as to warnings given the Appellant, and the incriminating statements of Appellant (Tr. 63-74).

On cross-examination, Agent Murray admitted that Appellant expressed a desire to see his wife for the purpose of securing an attorney; that he (Agent Murray) searched the streets for the Appellant's wife and learned that she had been unsuccessful in locating an attorney (Tr. 79).

It is submitted that the Government failed to demonstrate that the Appellant waived his right to counsel and to remain silent prior to his incriminating statements. The evidence that Appellant refused to sign a waiver of his rights, sought opportunity to contact his wife for the purpose of consulting counsel is not in conflict. The record only shows the bare uncorroborated conclusion on the part of Agent Murray that Appellant orally waived his rights to remain silent and to counsel.

This Court in Frazier v. Cupp, 394 U.S. 731, 737, 89 S. Ct. 1420, 1424 in a past Escobedo and pre Miranda case, in response to

Petitioner's argument, that his statement about getting a lawyer was sufficient to bring Escobedo into play and that the police should immediately have stopped the questioning and obtain counsel, stated that it might agree were Miranda applicable to the case, quoting the officers' duty to cease questioning when a suspect indicated in any manner that he wished to consult an attorney before speaking.

The United States Court of Appeals for the Fourth Circuit in the case of United States v. Thompson, 4 Cir., 417 F. 2d 196, 197, where the defendant refused to sign a waiver, stated he understood his rights and answered the officers' questions, held the confession admissible inasmuch as there was no evidence of prolonged interrogation and coercion. The opinion does not reveal an oral waiver of rights.

See United States v. Hayes, 4 Cir., 385 F. 2d. 375, 377-378, where the Fourth Circuit Court of Appeals found "other fully effective equivalent waiver" in the absence of a written or oral waiver.

It is submitted that as the initial impact of Miranda recedes into history, there is grave danger that trial courts may in a perfunctory manner grudgingly apply the Miranda principles, strain to find implied waiver of constitutional rights and in reality shift the burden of proof from the Government to the suspect.

PRAYER

WHEREFORE, the Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court on hearing quash the Judgment of the United States Court of Appeals, Fourth Circuit, affirming the Judgment and Sentence of the District Court and Petitioner further prays for such other further general relief as may be meet and proper.

Respectfully submitted,

TONEY AND GUARISCO
200 East College Avenue
Tallahassee, Florida

Attorneys for Petitioner.

S. GUNTER TONEY

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Petition for Writ of Certiorari, by air-mail, to the Honorable Warren H. Coolidge, United States Attorney, P. O. Box 2597, Raleigh, North Carolina, and a copy to Solicitor General, Department of Justice, Washington 25, D. C., on this 7th. day of May, 1970.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,447.

Willie Ellis Lanier,

Appellant,

VERSUS

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina.

ORDER

Upon consideration of the record and the briefs the court is of the opinion that oral argument will not be necessary and that there is no merit to the appeal. The judgment of the District Court is hereby affirmed.

s/ Simon E. Sobeloff
United States Circuit Judge

s/ J. Braxton Craven, Jr.
United States Circuit Judge

/S/ [illegible]
United States Circuit Judge

FILED

SAMUEL W PHILLIPS
CLERK

A True Copy. Test:
Samuel W.
By [illegible]
Deputy Clerk